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# In the Supreme Court of the United States

October Term, 1979
No. 79-1463

CARYL M. KLINE, ROBERT E. CASEY, FRED M. HEDDINGER, WILLIAM F. JACOBS, JR., JOHN D. KILLIAN, JACQUE D. ANGLE, FRANCIS MORAN, J. HENRY EISENHART, BENJAMIN L. STACKOWSKI, SAMUEL CORRADO, RICHARD C. HARRIS, and the PUBLIC SCHOOL EMPLOYES' RETIREMENT BOARD,
*Petitioners*

vs.

MARGARET ANNE BLAKE, a Minor, by JAMES BLAKE, Her Guardian

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The Public School Employees' Retirement Board, and its individual members, hereby petition that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on December 20, 1979.

## I. OPINIONS BELOW

The opinion of the Court of Appeals, reproduced at 41a to 59a, is not yet reported.

The opinion and order of the District Court is reported at 462 F. Supp. 825 (E.D. 1978) and is reproduced at 33a to 40a.

## II. JURISDICTION

The judgment of the Court of Appeals was entered on December 20, 1979. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.

## III. QUESTION PRESENTED

This petition raises the question of what standards must be applied by a federal court in determining whether a public agency with broad state-wide statutory powers is a part of the state for the purposes of the Eleventh Amendment. In vacating the district court's order dismissing this action against the Pennsylvania School Employees' Retirement Board on Eleventh Amendment grounds, the Court of Appeals set forth a complex set of legal and factual issues which must be decided in order to determine the status of such an agency for Eleventh Amendment purposes. Thus, the following question is presented:

> Is a Retirement Board established by state statute and given broad statutory power to administer retirement benefits for state college and public school employees protected by the Eleventh Amendment when all payments made by the Board from the retirement fund are statutory obligations of the state?

## IV. STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Pennsylvania Public School Employees' Retirement Code include Section 8301, 24 Pa. C.S.A. §8301, Sections 8326-8330, 24 Pa. C.S.A. §8326-30, Sections 8501-05, 24 Pa. C.S.A. §§8501-05, Sections 8521-25, 24 Pa. C.S.A. §§8521-25 and Sections 8531-33, 24 Pa. C.S.A. §§8531-33. Those provisions are set forth verbatim in the Appendix hereto at 1a-28a.

## V. STATEMENT OF THE CASE

### A. Procedural History

Margaret Ann Blake, a minor, brought this diversity action against the Public School Employees' Retirement Board (hereinafter "Retirement Board") and its individual members seeking to recover money damages. The complaint alleged that plaintiff was entitled to $57,014.70 in benefits from the Retirement Board, accruing upon the death of her mother, a Philadelphia school teacher, but that the Board had improperly paid those monies to another person (31a-32a). Plaintiff sought damages on the grounds that the Retirement Board had breached contractual and fiduciary duties owed to her and that its conduct was negligent.

Relying on the various provisions of Pennsylvania's Public School Employees' Retirement Code which established the Board and defined its powers, the Retirement Board moved to dismiss the action on the ground, *inter alia,* that the district lacked subject matter jurisdiction because of the Eleventh Amendment. The district court granted that motion, holding that a suit against the Retirement Board was, for all practical purposes, a suit against the Commonwealth and, therefore, barred by the Eleventh Amendment. *Blake v. Kline,* 462 F. Supp. 825 (E.D. Pa. 1978).

In its decision, the court reviewed the various statutory characteristics of the Retirement Board as well as the only state appellate court decision considering the state

law immunity of the Board. In support of its holding,[1] the district court relied heavily on "the facts that the funds are exempt from *both* municipal and state taxation, and that payments of benefits are *expressly made obligations of the Commonwealth*". 462 F. Supp. at 828 (37a-38a) (footnotes omitted). Because plaintiff conceded that the individual Board members were sued merely as nominal parties in an effort to reach the fund they administer, the district court also dismissed the action as to them.

On appeal, the Court of Appeals vacated and remanded the case for the development of an extensive factual record on the jurisdictional question. *Blake v. Kline,* No. 79-1161 (3d Cir. filed December 20, 1979) (59a). In so doing, the Court of Appeals expressly rejected the state appellate court's holding and listed six factors which the district court should consider on remand: (1) How does local law define the status and nature of the Retirement Board and its relation to Pennsylvania? (2) Whether payment of the judgment will be made from the state treasury or from Retirement Board funds? (3) Whether the Retirement Board is performing a governmental or proprietary function? (4) Whether the Retirement Board has corporate powers and is autonomous? (5) Whether the agency's property is immune from state taxation? (6) Whether the sovereign has immunized itself from responsibility for the Retirement Board's operations? (45a-54a) After discussing each fac-

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[1] In *United Brokers Mortgage Co. v. Fidelity Philadelphia Trust Co.*, 26 Pa. Commonwealth Ct. 260, 363 A.2d 817 (1976), the Pennsylvania Commonwealth Court held that the Retirement Board was an "integral part of the Commonwealth" and was therefore shielded by the state constitutional immunity of the Commonwealth. 26 Pa. Commonwealth Ct. at 264, 363 A.2d at 820.

tor, the court concluded that it was necessary "to go beyond the statutory language and examine the operational structure of the agency and its relationship to the Commonwealth" (59a).

It is from that decision that the defendants, hereinafter referred to as petitioners, seeks a Writ of Certiorari.

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## B. The Pennsylvania Public School Employees' Retirement Board

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Under the Public School Employees Retirement Code (Code), 24 Pa. C.S.A. §8101 et seq., the Retirement Board is an administrative board under the Commonwealth's Department of Education consisting of eleven members, including the State Treasurer, the Secretary of Education and two gubernatorial appointees.[2]

Under the Code, the Retirement Board is responsible for the operation of the retirement system which mandatorily includes teaching and administrative employees of the public schools, the state colleges and universities and other state schools, as well as some employees of the Commonwealth's Department of Education.[3] As part of their statutory duties, members of the Retirement Board have exclusive control and management of the Public School Employees' Retirement Fund (Fund).[4] The State

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[2] 24 Pa. C.S.A. §8501(a); Section 202 of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, Pa. Stat. Ann. Tit. 71 §62.

[3] 24 Pa. C.S. §§8301, 8503-8505.

[4] 24 Pa. C.S.A. §8521(a).

Treasurer is custodian of this Fund, 24 Pa. C.S.A. §8521 (c), which consists of "all monies in the several separate funds in the State Treasury set apart to be used under the direction of the Board for the benefit of members of the system. . . ."[5]

Monies in the Fund are derived from contributions by the Commonwealth,[6] the employer,[7] and the employee,[8] as well as investment income; however, *all* payments from the Fund are expressly made "obligations of the Commonwealth".[9] In addition, the Commonwealth's contribution to the Fund includes its contribution as employer when it acts in that capacity.[10] The Commonwealth also is obligated to make payments for administrative expenses where PSERB's earnings are insufficient, and must make certain payments on account of social security deductions.[11]

It is impossible to say with exactitude that the Commonwealth's contribution represents a certain percentage of all monies in the Fund because that contribution has been invested and commingled with other monies. However, in the last seven years, the Commonwealth's contribution, solely in its capacity as the Commonwealth under 24 Pa. C.S.A. §8326, has exceeded $100,000,000.00 each year, and has increased steadily throughout that period.

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[5] 24 Pa. C.S.A. §8522.
[6] 24 Pa. C.S.A. §8326.
[7] 24 Pa. C.S.A. §8327.
[8] 24 Pa. C.S.A. §8321-8324.
[9] 24 Pa. C.S.A. §8531.
[10] 24 Pa. C.S.A. §8326(a).
[11] 24 Pa. C.S.A. §8521(b).

## VI. REASONS FOR GRANTING THE WRIT

### A. This Case Involves a Question of Great Public Importance Not Previously Decided by This Court

The decision of the lower court creates substantial confusion concerning the jurisdiction of federal courts over actions against various state agencies. Accordingly, it substantially interferes with the state's ability to plan its budget in a meaningful way. This is because many of the facts set forth by the court below as relevant in deciding the Eleventh Amendment question will change over time for reasons beyond the control of state officials.

For example, on remand, the district court will be required to determine whether this particular judgment will, in fact, require payment from the state treasury or Retirement Board funds (48a-51a). This factor will obviously vary from case to case and year to year depending, in part, on the size of the judgment, and, in part, on the financial condition of the fund.[12] Likewise, the nature and size of the Commonwealth's contribution to the funds (48a-49a) and whether the plan covers primarily

[12] Thus, under the analysis adopted by the Court of Appeals, the larger the judgment, the less likely federal jurisdiction will exist. Likewise, a poorly managed fund is more likely to be protected by the Eleventh Amendment than one which is well managed.

state or non-state employees (51a) may change from year to year.

The lower court correctly recognized that Eleventh Amendment immunity is, in large part, a matter of status—is the named party an *alter ego* of the state (42a). Obviously, large amounts of money—potential judgments—are dependent on that status. Certainly, if the facts by which that status is determined can change over time, state legislatures will be unable to predict whether or not a given agency will be subject to suit and, accordingly, will be unable to budget for such agencies in a meaningful manner.[13]

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[13] This difficulty will be exacerbated by the complexity of the standard established by the Court of Appeals as it listed at least twelve factual questions which it considered relevant in deciding the Eleventh Amendment question, including: (1) "the nature and size" of the various contributions of the Commonwealth to the Fund (48a-49a), (2) "whether payment of the judgment in this case will be paid from the state treasury or from PSERB [Retirement Board] funds" (49a), (3) "whether title to the funds is in the State or in the Board" (50a), (4) "whether the State Treasurer performs a ministerial function or whether he has some discretion in administering the fund" (50a), (5) "whether the PSERB funds are subject to attachment in the event the state defaults in the payment of its general obligations" (50a), (6) "whether or not the PSERB performs government functions" (51a), (7) "whether the plan covers primarily state or non-state employees" (51a), (8) the number of individuals and the percentages of contributions by employees of the Department of Education, the state colleges and local school teachers and administrative personnel (51a), (9) whether participation by employees is voluntary or mandatory (51a), (10) "[w]hether or not the Board does in fact operate like a separate corporation" (52a), (11) "whether the PSERB's property enjoys immunity from taxation in a manner not offered to analogous private insurers" (53a),

Moreover, this Court has never dealt with the questions presented by this Petition. In prior Eleventh Amendment cases, it was always assumed that the state-party was an arm of the state for Eleventh Amendment purposes. *See, e.g., Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976); *Edelman v. Jordan,* 415 U.S. 651 (1974); *Ford Motor Co. v. Department of Treasury,* 323 U.S. 459 (1945). When this issue has arisen, it has only been in the context of whether the party was properly considered a part of the state or more properly a local governmental entity. *See Mt. Healthy School District Board of Education v. Doyle,* 429 U.S. 274, 279-81 (1977).

Here, there is no question that the Retirement Board is a state-level body. The question is whether the Court of Appeals erred in developing a twelve-factor test to determine whether the Retirement Board is an "arm of the state". This Court has never explored this important area of determining the proper method of ascertaining which state agencies are subject to Eleventh Amendment immunity.[14]

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(12) "whether the state has ever had to spend its funds under [the provision Pa. C.S. §8531 making all expenditures from the fund obligations of the Commonwealth] . . . and whether the PSERB can meet the judgment in this case from its own funds" (54a).

[14] While the decision herein is clearly interlocutory, this Court has, in the past, reviewed interlocutory decisions involving important questions of law fundamental to the further conduct of the case, particularly those of a jurisdictional nature. *See Larson v. Domestic and Foreign Commerce Corp.,* 337 U.S. 682, 685 n. 3 (1949); *Land v. Dollar,* 330 U.S. 731, 734 n.2 (1947).

Moreover, it is an issue which can only be decided by this Court. Thus, considerations of judicial economy argue forcefully for review at this time.

**B. The Decision of the Court of Appeals Is In Direct Conflict With the Analysis Applied by the Court of Appeals for the Second Circuit in a Similar Case**

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In *Fitzpatrick v. Bitzer,* 519 F.2d 559 (2nd Cir. 1975), *rev'd in part on other grounds,* 427 U.S. 445 (1976), the Court of Appeals for the Second Circuit held that the Connecticut State Employees' Retirement Commission was an arm of the state for the purposes of Eleventh Amendment immunity. Like the retirement fund at issue in this case, the Connecticut fund was under the control of the State Treasurer, who held state and employee contributions in a separate fund.[15] Further, Connecticut's statutory contribution, like Pennsylvania's,[16] was worded in terms of the amount needed to maintain actuarially required levels. 519 F.2d at 564, 565.

Significantly, however, under Pennsylvania law, all obligations of the retirement fund, including the maintenance of reserves, are expressly made obligations of the Commonwealth. 24 Pa. C.S.A. §8531. No such provision was discussed by the Second Circuit in analyzing the Connecticut fund.

Nonetheless, in holding that the Eleventh Amendment barred the suit against the Connecticut retirement fund, the Second Circuit found that: "A judgment against the fund would thus automatically increase the obligations of the general state treasury and amount to a judgment against the state" (footnote omitted). 519 F.2d at 565.

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[15] 24 Pa. C.S.A. §§8521-25.

[16] 24 Pa. C.S.A. §8326.

Certainly, under Pennsylvania law, the same conclusion must be reached as to a judgment in this case.

While every state's retirement system is slightly different, the decision in *Fitzpatrick* can only be viewed as in direct conflict with the Third Circuit's approach. The Pennsylvania Retirement Board has many more aspects of sovereignty than that of Connecticut yet the Third Circuit declined to adopt the reasoning of the Second Circuit.

In addition, two other district courts have held, purely as a matter of law, that similar retirement boards were entitled to the immunity of the sovereign under the Eleventh Amendment. *See Flesch v. Eastern Pennsylvania Psychiatric Institute,* 434 F. Supp. 963 (E.D. Pa. 1977) (Pennsylvania State Employees Retirement Board); *21 Properties, Inc. v. Romney,* 350 F. Supp. 1322 (N.D. Tex. 1973) (New York State Teachers' Retirement System).

This conflict between the Third Circuit and the Second Circuit and other district courts provides a compelling reason for granting the Writ of Certiorari. *See United States v. General Motors Corp.,* 323 U.S. 373, (1945); *Hanover Star Milling Co. v. Metcalf,* 240 U.S. 403, 408-09 (1916).

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**C. The Decision of the Court of Appeals Is in Direct Conflict With the Only State Appellate Court Decision on Point**

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In *United Brokers Mortgage Co. v. Fidelity Philadelphia Trust Co.,* 26 Pa. Commonwealth Ct. 260, 363 A.2d 817 (1976) (en banc), Commonwealth Court sus-

tained preliminary objections filed by the PSERB on the basis of sovereign immunity under state law. The court based its decision on the various provisions of the Code relied on by the district court in this case.

While the Eleventh Amendment question is one of federal law, state court decisions on the nature of the entity created by the Legislature are entitled to the utmost respect. *Skehan v. Board of Trustees of Bloomsburg State College,* 538 F.2d 53, 62 (3d Cir.) (en banc), *cert denied,* 429 U.S. 979 (1976). In this case, however, the Court of Appeals declined to follow such a decision speculating that the state's highest court would hold otherwise.

The critical nature of this conflict is obvious. The conflict between Commonwealth Court and the Third Circuit's decision creates uncertainty in the law in Pennsylvania and encourages "forum shoppers" to seek out the federal courts. Moreover, Commonwealth Court's decision is entitled to special weight because it was an *en banc* decision by the court which has jurisdiction over all appeals from state agency decisions. Judicial Code, 42 Pa. C.S.A. §763. Thus, its special expertise in this area should be recognized by the federal courts, particularly because there is no reason to conclude that the Pennsylvania Supreme Court would decide the question differently. This conflict with an intermediate state appellate court decision provides the basis for granting the writ. *See Six Companies v. Joint Highway District, No. 13 of California,* 311 U.S. 180, 185 (1940); *West v. American Telephone and Telegraph Co.,* 311 U.S. 271, 226 (1949); *Stoner v. New York Life Insurance Co.,* 311 U.S. 464, 467-69 (1940).

## CONCLUSION

For the foregoing reasons, Petitioners respectfully request that a Writ of Certiorari issue to review the judgment in the Court of Appeals for The Third Circuit in this case.

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# APPENDIX

## STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Pennsylvania Public School Employees Retirement Code include Section 8301, 24 Pa. C.S.A. §8301, Sections 8326-8330, 24 Pa. C.S.A. §8326-30, Sections 8501-05, 24 Pa. C.S.A. §§8501-05, Sections 8521-25, 24 Pa. C.S.A. §§8521-25 and Sections 8531-33, 24 Pa. C.S.A. §§8531-33. Those provisions are set forth below.

## PENNSYLVANIA PUBLIC SCHOOL EMPLOYEES RETIREMENT CODE

### (24 Pa. C.S.A. §§8031, 8326-30, 8501-05, 8521-25, 8531-33)

§8301 Mandatory and optional membership.

(a) *Mandatory membership.*—Membership in the system shall be mandatory as of the effective date of employment for all school employees except the following:

(1) Any officer or employee of the Department of Education, State-owned educational institutions, community colleges, area vocational-technical schools, technical institutes, or the Pennsylvania State University and who is a member of the State Employees' Retirement System or a member of another retirement program approved by the employer.

(2) Any school employee who is employed on a per diem or hourly basis for less than 80 full-day sessions or 500 hours in any fiscal year.

(3) Any officer or employee of a governmental entity who subsequent to December 22, 1965 and prior to July 1, 1975 administers, supervises, or teaches classes financed wholly or in part by the Federal Government so long as he continues in such service.

(4) Any part-time school employee who has an individual retirement account pursuant to the Federal act of September 2, 1974; (Public Law 93-406, 88 Stat. 829), known as the "Employee Retirement Income Security Act of 1974."

(b) *Prohibited membership.*—The school employees categorized in subsection (a) (1) and (2) shall not have the right to elect membership in the system.

(c) *Optional membership.*—The school employees categorized in subsection (a) (3) and, if otherwise eligible, subsection (a) (4) shall have the right to elect membership in the system. Once such election is exercised, membership shall commence from the original date of eligibility and shall continue until the termination of such service.

* * * * * * * * *

§8326. Contributions by the Commonwealth.

(a) *Contributions on behalf of active members.*—The Commonwealth shall make contributions into the fund on behalf of all active members in an amount equal to one-half the amount certified by the board as necessary to provide, together with the members' contributions, annuity reserves on account of prospective annuities as

provided in this part in accordance with section 8328(a), (b) and (c) (relating to actuarial cost method). In case a school employee has elected membership in a retirement program approved by the employer, the Commonwealth shall contribute to such program on account of his membership an amount no greater than the amount it would have contributed had the employee been a member of the Public School Employees' Retirement System.

(b) *Contributions on behalf of annuitants.*—The Commonwealth shall make contributions on behalf of all annuitants in an amount equal to one-half of the amount certified by the board as necessary to fund the additional liabilities for minimum and supplemental annuities in accordance with section 8328(d).

* * * * * * * * *

§8327. Payments by employers.

(a) *General rule.*—Each employer, including the Commonwealth as employer of employees of the Department of Education, State-owned colleges and universities, Thaddeus Stevens Trade School, Pennsylvania State Oral School for the Deaf, Scotland School for Veterans' Children, and the Pennsylvania State University, shall make payments to the fund each quarter in an amount equal to one-half the sum of the percentages, as determined under section 8328 (relating to actuarial cost method), applied to the total compensation during the pay periods in the preceding quarter of all its employees who were members of the system during such period.

(b) *Deduction from appropriations.*—To facilitate payment of amounts due from any employer to the fund through the State Treasurer and to permit the exchange of credits between the State Treasurer and any employer,

the Secretary of Education and the State Treasurer shall cause to be deducted and paid into the fund from the amount of any moneys due to any employer on account of any appropriation for schools or other purposes such amount due to the fund as certified by the board and as remains unpaid on the date such appropriations would otherwise be paid to the employer, and such amount shall be credited to the employer's account in the fund.

* * * * * * * * *

§8328. Actuarial cost method.

(e) *Employer contribution rate on behalf of active members.*—The amount of the total employer contributions on behalf of all active members shall be computed by the actuary as a percentage of the total compensation of all active members during the period for which the amount is determined and shall be so certified by the board. The total contribution rate on behalf of all active members shall consist of the normal contribution rate and the accrued liability contribution rate.

(b) Normal contribution rate.—The normal contribution rate shall be determined after each actuarial valuation. Until all accrued liability contributions have been completed, the normal contribution rate shall be determined, on the basis of an annual 5 1/2% interest rate and such mortality and other tables as shall be adopted by the board, as a level percentage of the compensation of the average new active member, which percentage, if contributed on the basis of his prospective compensation through the entire period of active school service, would be sufficient to fund the liability for any prospective benefit payable to him, in excess of that portion funded by his prospective member contributions. After all accrued lia-

bility contributions have been completed, the normal contribution rate shall be determined by deducting from the present value of the liabilities for all prospective benefits of active members, the sum of the total assets in the fund on the valuation date, excluding the balance in the annuity reserve account, and the present value of prospective member contributions, and dividing the remainder by the present value of the future compensation of all active members.

(c) *Accrued liability contribution rate.*—For the fiscal year beginning July 1, 1967, the accrued liability contribution rate shall be computed as the rate of total compensation of all active members which shall be certified by the actuary as sufficient to fund over a period of 30 years from such date the present value of the liabilities for all prospective benefits of active members in excess of the total assets in the fund, excluding the balance in the annuity reserve account, and of the present value of normal contributions and of member contributions payable with respect to all active members on such date during the remainder of their active service. Thereafter, the amount of each annual accrued liability contribution shall be at least 4% greater than the amount of such contribution for the previous fiscal year, except that, if the accrued liability is increased by legislation enacted subsequent to July 1, 1967, such additional liability shall be funded over a period of 30 years from the first day of July, coincident with or next following the effective date of the increase on the basis that each succeeding annual additional accrued liability contribution shall be at least 4% greater than the amount of such additional contribution for the previous fiscal year. The accrued liability contributions under this section shall be discontinued as

soon as the total assets in the fund, excluding the balance in the annuity reserve account equals the present value of the liability for all prospective benefits of active members, less the present value of the prospective normal contributions and of member contributions payable with respect to all active members on such date during the remainder of their active service.

(d) *Supplemental annuity contribution rate.*—Contributions from the Commonwealth and other employers required to provide for the payment of supplemental annuities to annuitants as provided in section 8348 (relating to supplemental annuities) shall be determined as a percentage of the total compensation of all active members during the period for which the amount is certified as sufficient to fund the liabilities of the supplemental retirement allowance account as a level percentage over a period of 30 years from July 1, 1967. In the event that annuities are increased by legislation enacted subsequent to July 1, 1974, the additional liability for the increase in benefits to annuitants shall be funded similarly as a level percentage over a period of 20 years from the first day of July coincident with or next following the effective date of such legislation.

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§8329. Payments on account of social security deductions from appropriations.

(a) *Payments by Commonwealth.*—Where the Secretary of Education enters into an agreement with the Commonwealth to place under the Federal Social Security Act members who have elected coverage, the Commonwealth shall pay into the contribution fund created under the provisions of the act of January 5, 1952 (1951 P.L. 1833,

No. 491), relating to social security coverage for government employees, such amounts and at such times as are required to be paid by the employers and the covered employees on account of such coverage.

(b) *Reimbursement by employers.*—The Commonwealth shall be reimbursed by the employers to the extent of the total amounts contributable by covered employees and by one-half of the contributions payable under the employer's tax established by the Federal Social Security Act on all covered wages which are not Federally funded. For the purpose of this part, the tax contributions payable shall be the first obligation against any State funds received by the employer for their use or authorized under the act of March 10, 1949 (P.L. 30, No. 14), known as the "Public School Code of 1949," and shall first be paid therefrom.

(c) *Deduction from appropriations.*—The Secretary of Education and the State Treasurer are hereby authorized to cause to be deducted and paid into or retained in the State Treasury from any moneys due to any employer on account of appropriations for schools or other purposes the amounts payable under the provisions of this section.

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§8330. Appropriations by the Commonwealth.

(a) *Annual submission of budget.*—The board shall prepare and through the Governor submit annually to the General Assembly an itemized budget consisting of the amounts necessary to be appropriated by the Commonwealth out of the General Fund required to meet the obligations accruing during the fiscal period beginning July 1 of the following year.

(b) *Appropriation and payment.*—The General Assembly shall make an appropriation sufficient to provide for the obligations of the Commonwealth. Such amount shall be paid by the State Treasurer through the Department of Revenue into the funds within 30 days of receipt of the requisition presented each quarter by the board.

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§8501. Public School Employees' Retirement Board.

(a) *Status and membership.*—The board shall be an independent administrative board and shall consist of 11 members: the Secretary of Education, ex officio; the State Treasurer, ex officio; the executive secretary of the Pennsylvania School Boards Association, ex officio; two to be appointed by the Governor, at least one of whom shall not be a school employee or an officer or employee of the State; three to be elected by the active professional members of the system from among their number; one to be elected by annuitants from among their number; one to be elected by the active nonprofessional members of the system from among their number; and one to be elected by members of Pennsylvania public school boards from among their number. The appointments made by the Governor shall be confirmed by the Senate and each election shall be conducted in a manner approved by the board. The terms of the appointed and elected members shall be three years. The chairman of the board shall be elected by the board members. Each ex officio member of the board may appoint a duly authorized designee to act in his stead.

(b) *Appointment and terms of initial members.*—For the purposes of securing an orderly transition and staggered terms, the elected members of the board serving on the effective date of this part shall serve until the ex-

piration of their respective terms. The board member initially elected by members of Pennsylvania public school boards shall serve until January 1, 1976. The board member initially elected by the active nonprofessional members of the system shall serve until January 1, 1977. One of the initial board members appointed by the Governor after the effective date of this part shall serve until January 1, 1976 and the second appointed board member shall serve until January 1, 1977. A vacancy occurring during the term of any member shall be filled for the unexpired term by a successor appointed or elected as the case may be in the same manner as his predecessor.

(c) *Oath of office.*—Each member of the board shall take an oath of office that he will, so far as it devolves upon him, diligently and honestly administer the affairs of said board and that he will not knowingly violate or wilfully permit to be violated any of the provisions of law applicable to this part. Such oath shall be subscribed by the member making it and certified by the officer before whom it is taken and shall be immediately filed in the office of the Secretary of the Commonwealth.

(d) *Compensation and expenses.*—The members of the board who are members of the system shall serve without compensation but shall not suffer loss of salary or wages through serving on the board. The members of the board who are not members of either the school system or the State Employees' Retirement System may be paid $100 per day when attending meetings and all board members shall be reimbursed for any necessary expenses. However, when the duties of the board as mandated are not executed, no compensation or reimbursement for expenses of board members shall be paid or payable during the period in which such duties are not executed.

(e) *Corporate power and legal advisor.*—For the purposes of this part, the board shall possess the power and privileges of a corporation. The Attorney General of the Commonwealth shall be the legal advisor of the board.

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§8502. Administrative duties of board.

(a) *Employees.*—The secretary, clerical and other employees of the board and their successors whose positions on the effective date of this part are under the classified service provisions of the act of August 5, 1941 (P.L. 752, No. 286), known as the "Civil Service Act," shall continue under such provisions. The compensation and classification of all other persons appointed shall be determined by the board and shall be consistent with the standards established by the Executive Board of the Commonwealth.

(b) *Professional personnel.*—The board shall contract for the services of a chief medical examiner, an actuary, an investment counselor, and such other professional personnel as it deems advisable.

(c) *Expenses.*—The board shall, through the Governor, submit to the General Assembly annually a budget covering the administrative expenses of this part. Such expenses as approved by the General Assembly in an appropriation bill shall be paid from investment earnings of the fund in excess of valuation interest, except that if in any year such earnings are not sufficient the balance required shall be appropriated from the General Fund.

(d) *Meetings.*—The board shall hold at least six regular meetings annually and such other meetings as it may deem necessary.

(e) *Records.*—The board shall keep a record of all its proceedings which shall be open to inspection by the public.

(f) *Functions.*—The board shall perform such other functions as are required for the execution of this part and shall have the right to inspect the employment records of employers.

(g) *Performance of employer duties.*—In the event the employer fails to comply with the procedures as mandated in section 8506 (relating to duties of employers), the board shall perform such duties and bill the employer who shall pay for the cost of same. In the event the employer is delinquent in payment of contributions in accordance with section 8327 (relating to payments by employers), the board shall notify the Secretary of Education and the State Treasurer of such delinquency.

(h) *Regulations and procedures.*—The board shall, with the advice of the Attorney General and the actuary, adopt and promulgate rules and regulations for the uniform administration of the system. The actuary shall approve in writing all computational procedures used in the calculation of contributions and benefits prior to their application by the board.

(i) *Data.*—The board shall keep in convenient form such data as are stipulated by the actuary in order that an annual actuarial valuation of the various accounts can be completed within six months of the close of each fiscal year. The board shall have final authority over the means by which data is collected, maintained and stored and in so doing shall protect the rights of its membership as to privacy and confidentiality.

(j) *Actuarial investigation and valuation.*—The board shall have the actuary make an annual valuation of the various accounts within six months of the close of each fiscal year. In the fiscal year ending 1975 and in every fifth year thereafter, the board shall have the actuary conduct an actuarial investigation and valuation of the system based on data including the mortality, service, and compensation experience provided by the board annually during the preceding five years concerning the members and beneficiaries. The board shall adopt such tables as are necessary for the actuarial valuation of the fund and calculation of contributions, annuities, and benefits based on the reports and recommendations of the actuary.

(k) *Certification of employer contributions.*—The board shall, each year in addition to the itemized budget, certify to the employers and the Commonwealth the percentage of members' payroll necessary for the funding of prospective annuities for active members and certify to them the rates and amounts of the normal contributions, accrued liability contributions and supplemental contributions which shall be paid to the fund and credited to the appropriate accounts. These certifications shall be regarded as final and not subject to modification by the Budget Secretary.

(l) *Commonwealth payments.*—The board shall within 30 days following the end of each quarter determine the amount due to the fund from the Commonwealth during that quarter and submit at that time a requisition for the amount determined to be due from the Commonwealth to the State Treasurer.

(m) *Member contributions and interest.*—The board shall cause each member's contributions, including

payroll deductions and all other payments, to be credited to the account of such member and shall pay all such amounts into the fund. Such contributions shall be credited with statutory interest until date of termination of service, except in the case of a vestee, who shall have such interest credited until the effective date of retirement or until the return of his accumulated deductions, if he so elects; and in the case of a multiple service member who shall have such interest credited until termination of service in both the school and the State systems.

(n) *Annual financial statement.*—The board shall prepare and have published, on or before January 1 of each year, a financial statement as of the fiscal year ending June 30 of the previous year showing the condition of the fund and the various accounts and setting forth such other facts, recommendations and data as may be of use in the advancement of knowledge concerning annuities and other benefits provided by this part. The board shall submit said financial statement to the Governor and shall make copies available to the employers for the use of the school employees and the public.

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§8503. Duties of board to advise and report to employers and members.

(a) *Manual of regulations.*—The board shall, with the advice of the Attorney General and the actuary, prepare within 90 days of the effective date of this part, a manual incorporating rules and regulations consistent with the provisions of this part for the employers who shall make information contained therein available to the general membership. The board shall thereafter advise the employers within 90 days of any changes in such rules and

regulations due to changes in the law or due to changes in administrative policies.

(b) *Member status statements.*—The board shall furnish annually on or before December 31, a statement to each member showing the accumulated deductions standing to the credit of the member and the number of years and fractional part of a year of service credited in each class of service as of June 30 of that year. Each member's statement shall be mailed to his home address and shall include a request that the member make any necessary corrections or revisions regarding his designated beneficiary, whose name at the request of the member shall remain confidential and not appear on this statement.

(c) *Purchase of credit for previous service.*—Upon receipt of an application from an active member or a State employee with multiple service credit to purchase credit for previous school or creditable nonschool service, the board shall determine and certify to the member the amount required to be paid by the member. When necessary, the board shall certify to the proper employer the amount which would have been paid together with statutory interest into the State accumulation account had such employee been an active member in the system during said period.

(d) *Purchase of Class T-C credit or full coverage.*—Upon receipt of an application from a member of Class T-A or Class T-B to become a member of Class T-C or an active joint coverage member who elects to become a full coverage member, the board shall determine and certify to the member the amount required to be paid by the member, the effective date of the transfer, and the prospective rate for regular member contributions.

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§8504. Duties of board to report to State Employees' Retirement Board.

(a) *Multiple service membership of school employees.*—Upon receipt of an application for membership in the system of a school employee who is a former State employee and who has elected multiple service membership, the board shall advise the State Employees' Retirement Board accordingly.

(b) *Multiple service membership of State employees.*—Upon receipt of notification from the State Employees' Retirement Board that a former school employee has become an active member in the State Employees' Retirement System and has elected to receive credit for multiple service, the board shall certify to the State Employees' Retirement Board and concurrently to the member:

(1) The total credited service in the system and the number of years and fractional part of a year of service credited in each class of service.

(2) The annual compensation received each school year by the member for credited school service.

(c) *Applications for benefits for State employees.*—Upon receipt of notification and the required data from the State Employees' Retirement Board that a former school employee who elected multiple service has applied for a State employee's retirement benefit or, in the event of his death, his legally constituted representative has applied for such benefit, the board shall:

(1) Certify to the State Employees' Retirement Board:

(i) The salary history as a member of the Public School Employees' Retirement System and the final average salary as calculated on the basis of the compensation received as a State and school employee.

(ii) The annuity or benefit which the member or his beneficiary is entitled to receive under this part and modified according to the option selected.

(2) Transfer to the State Employees' Retirement Fund the accumulated deductions standing to such member's credit and the actuarial reserve required on account of the member's years of credited service in the school system and his final average salary determined on the basis of his compensation in both systems.

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§8505. Duties of board regarding applications and elections of members.

(a) *Statement to new members.*—As soon as practicable after each member shall have joined the system, the board shall issue to him a statement as to the aggregate length of total previous school service and creditable non-school service for which he may receive credit.

(b) *State employees electing multiple service status.*—Upon receipt of notification from the State Employees' Retirement Board that a former school employee has become an active member in the State Employees' Retirement System and has elected to become a member with multiple service status, the board shall:

(1) In case of a member who is receiving an annuity from the system, discontinue payments, transfer the present value, at that time, of the member's

annuity from the annuity reserve account to the member's savings account and resume crediting of statutory interest on the amount restored to his credit and transfer the balance of the present value of the total annuity from the annuity reserve account to the State accumulation account.

(2) In case of a member who is not receiving an annuity from the system and who has not withdrawn his accumulated deductions, continue or resume the crediting of statutory interest on his accumulated deductions.

(3) In case of a member who is not receiving an annuity from the system and his accumulated deductions were withdrawn, certify to the member the accumulated deductions as they would have been at the time of his separation had he been a full coverage member together with statutory interest for all periods of subsequent State and school service to the date of repayment. Such amount shall be restored by him and shall be credited with statutory interest as such payments are restored.

(c) *Disability annuities.*—In every case where the board has received an application for a disability annuity based upon physical or mental incapacity for the performance of the job for which the member is employed, the board shall:

(1) Through the chief medical examiner, have the applicant examined and, on the basis of said examination and the subsequent recommendation by the chief medical examiner regarding the applicant's medical qualification for a disability annuity along with such other recommendations which he may make with respect to the permanency of disability or the

need for subsequent reexaminations, make a finding of disability or nondisability and, in the case of disability, establish an effective date of disability and the terms and conditions regarding subsequent reexaminations.

(2) Upon the recommendation of the chief medical examiner on the basis of subsequent medical examinations, make a finding of disability or nondisability and, in the case of a finding of nondisability, establish the date of termination of disability and at that time discontinue any annuity payments in excess of any annuity to which he may be otherwise entitled under section 8342 (relating to maximum single life annuity).

(3) Upon receipt of a written statement from a disability annuitant of his earned income of the previous year, adjust the payments of the disability annuity for the following year in accordance with the provisions for a reduction of disability payments of section 8344 (relating to disability annuities).

(d) *Withdrawal of accumulated deductions.*—Upon receipt of an application to withdraw his accumulated deductions executed by a member who is terminating school service and the required data from the employer, the board shall pay to such member within 60 days after filing the application or termination of school service, whichever is later, the accumulated deductions standing to his credit.

(e) *Certification to vestees terminating service.*—The board shall certify to a vestee within one year of termination of service of such member:

(1) The accumulated deductions standing to his credit at the date of termination of service.

(2) The number of years and fractional part of a year of credit in each class of service.

(3) The maximum single life annuity to which the vestee shall become entitled upon the attainment of superannuation age and the filing of an application for such annuity.

(f) *Notification to vestees approaching superannuation age.*—The board shall notify each vestee in writing 90 days prior to his attainment of superannuation age that he shall apply for his annuity within 90 days of attainment of superannuation age and that failure to apply within that time shall result in the cancellation of the right of the vestee to any death benefit in excess of his accumulated deductions.

(g) *Initial annuity payment and certification.*—The board shall make the first monthly payment to a member who is eligible for an annuity within 60 days of the filing of his application for an annuity and receipt of the required data from the employer of the member. Concurrently the board shall certify to such member:

(1) The accumulated deductions standing to his credit showing separately the amount contributed and the interest credited to the date of termination of service.

(2) The number of years and fractional part of a year credited in each class of service.

(3) The final average salary on which his annuity is based as well as any applicable reduction factors due to age or election of an option or both.

(4) The total annuity payable under the option elected and the amount and effective date of any future reduction on account of social security old-age insurance benefits.

(h) *Death benefits.*—Upon receipt of notification of the death of a member, the board shall notify the designated beneficiary or survivor annuitant of the benefits to which he is entitled and shall make the first payment to the beneficiary under the plan elected by the beneficiary within 60 days of receipt of certification of death and other necessary data.

(i) *Medical insurance coverage.*—Upon receipt of notification from an insurance carrier approved by the board that an annuitant who has attained age 65 has elected medical, major medical, and hospitalization insurance coverage, the board shall deduct from the annuity payments the appropriate annual charges in equal monthly installments. Such deductions shall be transmitted to the insurance carrier.

(j) *Joint coverage annuitants.*—The board shall notify in writing each joint coverage annuitant who retired prior to July 1, 1962 that he may elect any time prior to, but not later than, one year following the effective date of this part, to receive his annuity without reduction attributable to social security coverage. The board shall within 60 days of such election certify in writing to each annuitant who so elects the amount required to be paid. Upon receipt of a lump-sum payment within 60 days in the amount certified to such annuitant, the board shall recompute the annuity payable to such annuitant and the annuity and/or lump sum, if any, payable upon his death to his beneficiary or survivor annuitant as though he had been a full coverage member on the effective date of retirement. Such recomputed annuity shall be paid beginning with the second monthly payment next following the month in which the lump-sum payment is received.

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§8521. Management of fund and accounts.

(a) *Control and management of fund.*—The members of the board shall be the trustees of the fund and shall have exclusive control and management of the said fund and full power to invest the same, subject, however, to all the terms, conditions, limitations, and restrictions imposed by this part or other law upon the making of investments. Subject to like terms, conditions, limitations, and restrictions, said trustees shall have the power to hold, purchase, sell, assign, transfer, or dispose of any of the securities and investments in which any of the moneys in the fund shall have been invested as well as of the proceeds of said investments and of any moneys belonging to said fund.

(b) *Crediting of interest.*—The board annually shall allow statutory interest to the credit of the members' savings account on the mean amount of the accumulated deductions of all members for whom interest is payable for the preceding year and valuation interest on the mean amount of the annuity reserve account for the preceding year to the credit of that account. The board annually shall allow valuation interest calculated on the mean amount for the preceding year of the balance in the State accumulation account excluding any earnings of the fund credited to the account during that year. In the event the total earnings for the year do not exceed 5 1/2% of the mean amount for the preceding year of the total assets of the fund less earnings credited to the fund during that year plus the administrative expenses of the board, the difference required to be appropriated from the General Fund shall be credited to the State accumulation account.

(c) *Custodian of fund.*—The State Treasurer shall be the custodian of the fund.

(d) *Payments from fund.*—All payments from the fund shall be made by the State Treasurer in accordance with requisitions signed by the secretary of the board and ratified by resolution of the board.

(e) *Fiduciary status of board.*—The members of the board, employees of the board, and agents thereof shall stand in a fiduciary relationship to the members of the system regarding the investments and disbursements of any of the moneys of the fund and shall not profit either directly or indirectly with respect thereto.

(f) *Name for transacting business.*—By the name of "The Public School Employees' Retirement System" or "The Public School Employees' Retirement System" all of the business of the system shall be transacted, its fund invested, all requisitions for money drawn and payments made, and all of its cash and securities and other property shall be held, except that, any other law to the contrary notwithstanding, the board may establish a nominee registration procedure for the purpose of registering securities in order to facilitate the purchase, sale, or other disposition of securities pursuant to the provisions of this part.

(g) *Deposits in banks and trust companies.*—For the purpose of meeting disbursements for annuities and other payments in excess of the receipts, there shall be kept available by the State Treasurer an amount, not exceeding 10% of the total amount in the fund, on deposit in any bank or banks in this Commonwealth organized under the laws thereof or under the laws of the United States or with any trust company or companies incorporated by any law of this Commonwealth, provided any of such banks or trust companies shall furnish adequate security for said deposit. The sum deposited in any one

bank or trust company shall not exceed 25% of the paid-up capital and surplus of said bank or trust company.

(h) *Investment in corporate stocks.*—Preferred and common stock of any corporation organized under the laws of the United States or of any commonwealth or state thereof or of the District of Columbia shall be an authorized investment of the fund, regardless of any other provision of law provided that:

(1) such stock be purchased with the exercise of that degree of judgment and care under the circumstances then prevailing which men of prudence, discretion and intelligence exercise in the management of their own affairs not in regard to speculation, but in regard to the permanent disposition of the funds, considering the probable income to be derived therefrom as well as the probable safety of their capital;

(2) in the case of any stock other than stock of a bank or insurance company, the stock is listed or traded (or if unlisted or not entitled to trading privileges shall be eligible for listing and application for such listing shall have been made) on the New York Stock Exchange or any other exchange approved by the Secretary of Banking;

(3) no investment in common stock be made which at that time would cause the book value of the investments in common stock to exceed 25% of the total assets of the fund;

(4) no more than 5% of the total assets of the fund be invested in common stocks in any one year, provided that any unused portion may be used in subsequent years, but in no event shall more than

8% of such assets be invested in common stocks in any one year;

(5) the amount invested in the common stock of any one company shall not exceed at cost 2% of the book value of the assets of the funds at the time of purchase and shall not exceed 5% of the issued and outstanding common stock of that company; and

(6) the percentage limitations of paragraphs (3) and (4) shall not apply to the reinvestment of funds realized from the sale or transfer of common stocks and no sale or other liquidation of any investment shall be required solely because of any change in market values whereby the percentages of stocks set forth in this subsection are exceeded.

(i) *Common stock defined.*—"Common stock" as used in subsection (h) shall include the stock certificates, certificates of beneficial interests, or trust participation certificates issued by any corporation or unincorporated association, included under the definition of "corporation" in subsection (j).

(j) *Corporation defined.*—"Corporation" as used in subsection (h) shall include a voluntary association, a joint-stock association or company, a business trust, a Massachusetts trust, a common-law trust, and any other organization organized and existing for any lawful purpose and which like a corporation, continues to exist, notwithstanding changes in the personnel of its members or participants and conducts its affairs through a committee, a board, or some other group acting in a representative capacity.

(k) *Investment in real estate and mortgages.*—Real estate subject to a lease to one or more financially respon-

sible tenants which lease shall not require managerial responsibility by the board; and bonds, notes and deeds of trust, of individuals or corporations secured by mortgages on real estate located in any state, district or territory of the United States, shall be an authorized investment of the board regardless of any other provision of law. The board shall promulgate regulations to implement the foregoing to insure the safety of investments made pursuant to this subsection which regulations shall be in accordance with generally accepted standards and investment principles for pension funds of comparable size. All instruments, transfers of interest, and all records pertaining to real estate, mortgages or bonds invested in by the board, shall be open to public inspection. Reports as requested by the board, shall be submitted on all real estate and mortgage investments by mortgage advisors and correspondents.

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§8522. Public School Employees' Retirement Fund.

The fund shall consist of all moneys in the several separate funds in the State Treasury set apart to be used under the direction of the board for the benefit of members of the system; and the Treasury Department shall credit to the fund all moneys received from the Department of Revenue arising from the contributions required under the provisions of Chapter 83 (relating to membership contributions and benefits) and all earnings from investments or moneys of said fund. There shall be established and maintained by the board the several ledger accounts specified in sections 8523 (relating to members' savings account), 8524 (relating to State accumulation account) and 8525 (relating to annuity reserve account).

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§8523. Members' savings account.

(a) *Credits to account.*—The members' savings account shall be the ledger account to which shall be credited the amounts of the contributions or lump sum payments made by active members in accordance with the provisions of Chapter 83 (relating to membership, contributions and benefits).

(b) *Interest and transfers from account.*—The individual member accounts to which interest is payable shall be credited with statutory interest. The accumulated deductions credited to the account of a member who dies in service or whose application for an annuity has been approved shall be transferred from the members' savings account to the annuity reserve account provided for in section 8525 (relating to annuity reserve account).

(c) *Charges to account.*—Upon the election of a member to withdraw his accumulated deductions, the payment of such amount shall be charged to the members' savings account.

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§8524. State accumulation account.

The State accumulation account shall be the ledger account to which shall be credited all contributions of the Commonwealth and other employers as well as the earnings of the fund. Valuation interest shall be allowed on the total amount of such account less any earnings of the fund credited during the year. The reserves necessary for the payment of annuities and death benefits as approved by the board and as provided in Chapter 83 (relating to membership, contributions and benefits) shall be transferred from the State accumulation account to the annuity reserve account. At the end of each year the required in-

terest shall be transferred from the State accumulation account to the credit of the members' savings account and the annuity reserve account. The administrative expenses of the board shall be charged to the State accumulation account.

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§8525. Annuity reserve account.

(a) *Credits and charges to account.*—The annuity reserve account shall be the ledger account to which shall be credited the reserves held for the payment of annuities and death benefits on account of all annuitants and the contributions from the Commonwealth and other employers as determined in accordance with section 8328 (relating to actuarial cost method) for the payment of the supplemental annuities provided in section 8348 (relating to supplemental annuities). The annuity reserve account shall be credited with valuation interest. After the transfers provided in sections 8523 (relating to members' savings account) and 8524 (relating to State accumulation account), all annuity and death benefit payments shall be charged to the annuity reserve account and paid from the fund.

(b) *Transfers from account.*—Should an annuitant be subsequently restored to active service, the present value of his member's annuity at the time of reentry into school service shall be transferred from the annuity reserve account and placed to his individual credit in the members' savings account. In addition, the actuarial reserve for his annuity less the amount transferred to the members' savings account shall be transferred from the annuity reserve account to the State accumulation account.

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SUBCHAPTER C

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§8531. State guarantee.

Statutory interest charges payable, the maintenance of reserves in the fund, and the payment of all annuities and other benefits granted by the board under the provisions of this part are hereby made obligations of the Commonwealth. All income, interest, and dividends derived from deposits and investments authorized by this part shall be used for the payment of the said obligations of the Commonwealth.

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§8532. State supervision.

The fund and ledger accounts provided for by this part shall be subject to the supervision of the State Insurance Department.

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§8533. Taxation, attachment and assignment of funds.

The right of a person to a member's annuity, a State annuity, or retirement allowance, to the return of contributions, any benefit or right accrued or accruing to any person under the provisions of this part, and the moneys in the fund are hereby exempt from any State or municipal tax, and exempt from levy and sale, garnishment, attachment, or any other process whatsoever, and shall be unassignable.

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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Civil Action No. 78-2517
Jury Trial

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MARGARET ANNE BLAKE, a Minor, by JAMES BLAKE, Her Guardian,

*Plaintiff*

v.

CARYL M. KLINE, ROBERT E. CASEY, FRED M. HEDDINGER, WILLIAM F. JACOBS, JR., JOHN D. KILLIAN, JACQUE D. ANGLE, FRANCIS MORAN, J. HENRY EISENHART, BENJAMIN L. STACKOWSKI, SAMUEL CORRADO, RICHARD C. HARRIS, and the PUBLIC SCHOOL EMPLOYES' RETIREMENT BOARD,

*Defendants*

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## COMPLAINT

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## COUNT ONE

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1. Plaintiff Margaret Anne Blake, a minor, is a citizen of the State of New Jersey. James Blake is the natural father and appointed guardian of the person and property of Margaret Anne Blake.

2. Defendants, Caryl M. Kline, Robert E. Casey, Fred M. Heddinger, William F. Jacobs, Jr., John D. Killian, Jacque D. Angle, Francis Moran, J. Henry Eisenhart, Benjamin L. Stackowski, Samuel Corrado and Richard C. Harris, are citizens of the Commonwealth of Pennsylvania and members of the Public School Employes' Retirement Board. Defendant the Public School Employes' Retirement Board is a corporation established by and existing under the laws of Pennsylvania with its principal office in Harrisburg, Pennsylvania.

3. The amount in controversy exceeds $10,000 exclusive of interest and costs and this Court has jurisdiction over this action under 28 U.S.C. §1332.

4. Marie Blake, deceased, was the mother of Margaret Anne Blake. Before her death, Marie Blake was employed as a teacher by the School District of Philadelphia.

5. During the course of her employment, Marie Blake paid periodic premiums to the Public School Employes' Retirement Board of the Commonwealth of Pennsylvania (hereinafter "the System" or "the Board"). Under the terms of Marie Blake's agreement with the System, defendants became contractually bound to pay Marie Blake or her designated beneficiary certain pension or death benefits.

6. Marie Blake died on November 7, 1976. As a result of her death, Marie Blake's designated beneficiary, Margaret Anne Blake, became entitled to $57,014.70 in death benefits in accordance with the provisions of the contractual agreement between Marie Blake and the System.

7. James Blake, on behalf of Margaret Anne Blake, has on numerous occasions requested that defendants honor their contractual obligations to Margaret Anne Blake by paying her the $57,014.70 to which she is entitled. On June 12, 1978, James Blake made a final, formal demand for the proceeds of Marie Blake's policy but defendants have continued to withhold the benefits from Margaret Anne Blake.

8. By failing to pay Margaret Anne Blake the $57,014.70 due her, defendants breached their contractual and statutory obligations to her.

9. By reason of defendants' breach of their contractual and statutory obligations, Margaret Anne Blake has been deprived of $57,014.70.

WHEREFORE, Margaret Anne Blake, a minor, by James Blake, her guardian, prays for damages in the sum of $57,014.70 and for such other relief as the Court deems proper.

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## COUNT TWO

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10. Paragraphs 1 to 9 of this Complaint are incorporated herein by reference as though they were fully set forth.

11. Defendants issued a check payable to "TILLIE BOONE GDN OF MARGARET BOONE," purportedly in payment of their obligation to Margaret Anne Blake, although no person named "Margaret Boone" had any interest in or right to the proceeds of Marie Blake's policy and Tillie Boone was not the guardian of Margaret Anne Blake.

12. In issuing the check payable to "TILLIE BOONE GDN OF MARGARET BOONE," defendants acted negligently and in disregard of their fiduciary duty to Margaret Anne Blake.

13. As a result of defendants' negligence and disregard of their fiduciary duty, Margaret Anne Blake has been deprived of $57,014.70 to which she is entitled.

WHEREFORE, Margaret Anne Blake, a minor, by James Blake, her guardian, prays for damages in the sum of $57,014.70 and for such other relief as the Court deems proper.

(s) Fred T. Magaziner
Arthur H. Rainey
Fred T. Magaziner
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102
215-972-3587
*Attorneys for Margaret Anne Blake, a minor, by James Blake, her Guardian*

Dated: July 25, 1978

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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Civil Action No. 78-2517
Filed Dec. 20, 1978
John J. Harding, Clerk

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MARGARET ANN BLAKE, a Minor, by James Blake, Her Guardian

v.

CARYL M. KLINE, ROBERT E. CASEY, FRED M. HEDDINGER, WILLIAM F. JACOBS, JR., JOHN D. KILLIAN, JACQUE D. ANGLE, FRANCIS MORAN, J. HENRY EISENHART, BENJAMIN L. STACKOWSKI, SAMUEL CORRADO, RICHARD C. HARRIS, and the PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

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MEMORANDUM AND ORDER

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HANNUM, *J.*, December 19th, 1978.

Plaintiff instituted this two-count action to recover certain death benefits allegedly due her from the Pennsylvania Public School Employees' Retirement Board (the PSERB). Defendants have moved to dismiss the Complaint pursuant to Rule 12(b), F. R. Civ. P., thereby squarely presenting the question of whether this Court is without subject matter jurisdiction by virtue of the Eleventh Amendment to the Constitution of the United States.

Defendants contend that the PSERB is the alter ego of the Commonwealth of Pennsylvania and hence, immune from suit in federal court. Concomitantly they argue, since the suit is one for money damages, and since suit against the PSERB is precluded, suit against the individual defendants is likewise barred. We now address those issues.

*Eleventh Amendment Immunity of the PSERB.*

Whether the PSERB is immune from suit by virtue of the Eleventh Amendment depends upon whether it can be said that it is the alter ego of the state. This question is one of federal, not state law. *Harris v. Pennsylvania Turnpike Commission,* 410 F.2d 1332, 1333 n. 1 (3d Cir. 1969). Nevertheless, as pointed out in *Krisel v. Duran,* 258 F. Supp. 845, 849 (S.D. N.Y. 1966), *aff'd per curiam,* 386 F.2d 179 (2d Cir. 1967), *cert. denied,* 390 U.S. 1042 (1968), local law and decisions defining the status and nature of the agency involved in its relation to the sovereign is a factor to consider in making this determination.

Other factors to be considered include whether any judgment plaintiff might be awarded would have to be made out of the state treasury; whether the agency is performing a governmental or proprietary function; whether it has been separately incorporated; the degree of autonomy it has over its operations; whether it has the power to sue and be sued and to enter into contracts; whether its property is immune from state taxation; and whether the sovereign has immunized itself from responsibility for the agency's operations. *Urbano v. Board of Managers of New Jersey State Prison,* 415 F.2d 247, 250-51 (3d Cir. 1969), citing *Krisel, supra.*

The Court has weighed these factors and, on balance, concludes that they point toward a finding that the PSERB is a separate arm of the Commonwealth entitled to Eleventh Amendment immunity from suit. We find support for this conclusion in the statutory scheme establishing the PSERB and the fund it administers, as well as from decisions by the Pennsylvania Commonwealth Court and the United States District Court for the Eastern District of Pennsylvania.

In *United Brokers Mortgage Co. v. Fidelity Philadelphia Trust Co.*, 26 Pa. Commw. Ct. 260, 363 A.2d 817 (1976), the Commonwealth Court clearly held that the PSERB's fund was so identified with the state as to preclude suit in trespass against it, based on sovereign immunity. In its holding the court was careful to point out the indices that rendered the fund conjugal with the state. This decision assists the Court here in divining local law on the subject of the agency's relation with the sovereign. Although this decision is now automatically controlling since the highest court of the Commonwealth has not specifically addressed the issue, *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967), it is presumptive evidence of state law which this Court is not free to ignore, absent other persuasive data that a contrary result would be reached by the Pennsylvania Supreme Court. *See National Surety Co. v. Midland Bank*, 551 F.2d 21 (3d Cir. 1977). We find no such other persuasive data in light of the newly enacted Act 152, Act of September 28, 1978, P.L. , No. 152. This Act is, by its terms, intended to apply retroactively and to bar actions that would otherwise have been permitted under *Mayle v. Pennsylvania Department of Highways*, Pa. , 388 A.2d 709 (1978).

In *United Brokers, supra,* the court held that both the funds administered by the PSERB and by the State Employees' Retirement Board [the SERB] bore the same intimate relationship with the Commonwealth, recognizing that each has the same status viz-a-viz the state. With this consideration in mind, the Court finds additional support for its conclusion that the instant suit is barred by the Eleventh Amendment in *Flesch v. Eastern Pennsylvania Psychiatric Institute,* 434 F. Supp. 963 (E.D. Pa. 1977). Therein the court reached the conclusion that the SERB was "a separate arm of the state entitled to Eleventh Amendment protection." *Flesch, supra,* at 977.

The statutory scheme establishing the SERB and the fund it administers is virtually identical in all material respects to the statutory scheme adopted for the PSERB and the fund here in question. In particular, the following points of similarity, *inter alia,* demonstrate the closeness of the boards' and funds' relations to the Commonwealth: both boards are defined as independent administrative boards, organized under state administrative departments;[1] the State Treasurer is an *ex officio* member of both boards,[2] is custodian of both funds,[3] and all payments from the funds are made by him;[4] the Attorney General is desig-

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[1] 24 Pa. C.S. §8501(a) establishes the PSERB as an independent administrative board; 71 Pa. C.S.§5901(a) likewise establishes the SERB as an independent administrative board. 71 P.S. §62 sets forth the departmental organization of each board: the PSERB is organized under the Department of Education; the SERB under the Department of State.

[2] 24 Pa. C.S. §8501(a); 71 Pa. C.S. §5901(a). In addition, the Secretary of Education is also an *ex officio* member of the PSERB. 24 Pa. C.S. §8501(a).

[3] 24 Pa. C.S. §8521(c); 71 Pa. C.S. §5931(c).

[4] 24 Pa. C.S. §8521(d); 71 Pa. C.S. §5931(d).

nated legal advisor to both boards;[5] and cooperation between the two boards is mandated.[6] Further, compensation of employees of the boards is directed to be consistent with the Civil Service Act and compensation standards established by the Executive Board of the Commonwealth.[7] Other points of similarity also exist.[8] But perhaps most significant in this regard are the facts that the funds are

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[5] 24 Pa. C.S. §8501(e); 71 Pa. C.S. §5901(e).

[6] A comparison of 24 Pa. C.S. §8504 with 71 Pa. C.S. §5904 demonstrates the interrelation between the two funds and the boards that administer them.

[7] 24 Pa. C.S. §8502(a); 71 Pa. C.S. §5902(a).

[8] For example, neither board is separately incorporated, although each is said to possess the "power and privileges of a corporation": 24 Pa. C.S. §8501(e); 71 Pa. C.S. §5901(e). Both boards hold their respective funds as trustees, with power to invest, and with "exclusive control and management" of the funds: 24 Pa. C.S. §8521(a); 71 Pa. C.S. §5931(a). The boards transact business in their own names: 24 Pa. C.S. §8521(f); 71 Pa. C.S. §5931(f). Both funds are set apart from the general state treasury: 24 Pa. C.S. §8522; 71 Pa. C.S. §5932. Both are subject to the supervision of the State Insurance Department: 24 Pa. C.S. §8532; 71 Pa. C.S. §5952. Employees covered by the statutes are required to make contributions to the funds: 24 Pa. C.S. §8321; 71 Pa. C.S. §5501. Administrative expenses are paid, generally, from earnings on the funds' investments: 24 Pa. C.S. §§8502(c), 8524; 71 Pa. C.S. §§5902(c), 5939; although any excess of expenses over earnings is appropriated from the state's general fund: 24 Pa. C.S. §8502(c); 71 Pa. C.S. §5902(c).

The only real distinction between the two boards—a distinction that appears immaterial—is their respective compositions. The PSERB is comprised of eleven members, including the State Treasurer, the Secretary of Education and two appointed by the Governor, subject to confirmation by the Senate. 24 Pa. C.S. §8501(a). The SERB, on the other hand, is comprised of seven, members, including the State Treasurer. The other six are ap-

exempted from *both* municipal and state taxation,[9] and that payment of benefits are *expressly made obligations of the Commonwealth.*[10]

The intimate ties to the Commonwealth are thus evident, and compel the same conclusion reached in *Flesch, supra:* that the PSERB is so identified with the state as to be immune from suit under the Eleventh Amendment. Accordingly, it appearing that the Commonwealth of Pennsylvania is the real, substantial party against whom the instant claims are asserted, defendant PSERB's jurisdictional attack based upon Eleventh Amendment sovereign immunity must be upheld, even though the state is not specifically named as a defendant. *Krisel, supra,* at 848.[11]

*Immunity of Individual Board Members.*

Regarding her claims against the individual board members, plaintiff concedes that they are sued merely as nominal parties in an effort to reach the fund they administer[12] Since the suit is one for money damages only, and since suit against the PSERB is barred by the Eleventh

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pointed by the Governor, subject to confirmation by the Senate. 71 Pa. C.S. §5901(a).

[9] 24 Pa. C.S. §8533; 71 Pa. C.S. §5953(a).

[10] 24 Pa. C.S. §8531; 71 Pa. C.S. §5951. The wording of these two sections is nearly identical.

[11] Having determined that the PSERB is the alter ego of the state, we need not consider the question of whether the state has waived its Eleventh Amendment immunity from suit. For even if it has, since jurisdiction is predicated here solely upon 28 U.S.C. §1332, subject matter jurisdiction is still lacking. *Harris, supra,* at 1333 n. 1.

[12] *See* Plaintiff's Memorandum of Law In Opposition To Defendants' Motion To Dismiss, Document No. 9, at 20. *See also* Plaintiff's Response To Defendants' Reply Memorandum Of Law In Support Of Motion To Dismiss, Document No. 11, at 4.

Amendment, she is precluded from so doing. *Scheuev v. Rhodes,* 416 U.S. 232, 237-38 (1974). Thus, these claims, too, must be dismissed.

Accordingly, the Court finds that it is without subject matter jurisdiction over the claims advanced in the complaint, and will, therefore, grant defendants' motion to dismiss.[13]

An appropriate Order follows.

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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Civil Action No. 78-2517

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MARGARET ANN BLAKE, a Minor by JAMES BLAKE, Her Guardian

v.

CARYL M. KLINE, ROBERT E. CASEY, FRED M. HEDDINGER, WILLIAM F. JACOBS, JR., JOHN D. KILLIAN, JACQUE D. ANGLE, FRANCIS MORAN, J. HENRY EISENHART, BENJAMIN L. STACKOWSKI, SAMUEL CORRADO, RICHARD C. HARRIS, and the PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

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[13] Parenthetically, the Court notes that a conference with counsel was held on December 5, 1978. At the conference the Court directed counsel to submit a report detailing plaintiff's efforts to recoup the damages here sought from the apparent true malefactor, one Tillie Boone. This was done to alert plaintiff to possible alternative routes of recovery, in which the Commonwealth would presumably do its utmost to cooperate.

## ORDER

AND NOW, this 19th day of December, 1978, it appearing that this Court is without subject matter jurisdiction in the above captioned action, it is ORDERED that the defendants' Motion To Dismiss is GRANTED and the action is hereby DISMISSED as to all defendants.

(s) J. B. Hannum
*J.*

UNITED STATES COURT OF APPEALS
For the Third Circuit

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No. 79-1161

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BLAKE, MARGARET ANNE, a Minor, by BLAKE, JAMES, Her Guardian, *Appellant*

v.

KLINE, CARYL M.; CASEY, ROBERT E.; HEDDINGER, FRED M.; JACOBS, WILLIAM F., JR.; KILLIAN, JOHN D.; ANGLE, JACQUE D.; MORAN, FRANCIS; EISENHART, J. HENRY; STACKOWSKI, BENJAMIN L.; CORRADO, SAMUEL; HARRIS, RICHARD C.; and the PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD, *Appellees*

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*Appeal From the United States District Court for the Eastern District of Pennsylvania*
D.C. Civil No. 78-2517

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Argued October 9, 1979

Before: Adams, Rosenn, and Weis, *Circuit Judges*

(Opinion Filed December 20, 1979)

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Gordon W. Gerber, Esquire; Arthur H. Rainey, Esquire; Fred T. Magaziner, Esquire (Argued), Dechert, Price & Rhoads, 3400 Centre Square West, 1500 Market Street, Philadelphia, PA 19102, *Attorneys for Appellant.*

David H. Allshouse, Esquire (Argued), Deputy Attorney General; Norman J. Watkins, Esquire, Deputy Attorney General Chief, Civil Litigation; Edward G. Biester, Jr., Esquire, Attorney General, Department of Justice, Commonwealth of Pennsylvania, Capitol Annex Building, Harrisburg, PA 17120, *Attorneys for Appellees.*

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## OPINION OF THE COURT

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ROSENN, *Circuit Judge*

This appeal primarily raises the complex issue of whether the Public School Employees' Retirement Board of Pennsylvania is an *alter ego* of the state so as to preclude the exercise of federal subject matter jurisdiction under the eleventh amendment, the diversity statute, and principles of state sovereign immunity. Because we conclude the record is deficient, we vacate the judgment of the district court and remand.

### I.

Plaintiff Margaret Anne Blake, a minor ("Margaret"), by James Blake, her guardian, both New Jersey residents, initiated this diversity action in the United States District Court for the Eastern District of Pennsylvania against the Public School Employees' Retirement Board and its officers ("PSERB" or "Board"), seeking damages in contract and tort. The complaint alleged that Margaret was entitled to $57,014.70 in benefits from the PSERB, accruing upon the death of her mother, Marie, a Philadelphia school teacher. The district court dismissed the complaint as barred by the eleventh amendment.

The complaint alleged that during the course of her employment Marie paid premiums to the PSERB and had an agreement which contractually bound the Board to pay

certain death benefits to Marie's designated beneficiary in the event of Marie's death. The complaint further alleged that upon Marie's death on November 7, 1976, the PSERB became obligated to pay Margaret $57,014.70. The plaintiff claimed the PSERB purported to satisfy its obligation by issuing a check payable to "TILLIE BOONE GDN OF MARGARET BOONE" although no person named "Margaret Boone" had any interest in or right to the proceeds of Marie's policy and Tillie Boone was not Margaret's guardian. The plaintiff sought damages on the grounds that the PSERB breached contractual and fiduciary duties owed to Margaret and that the Board's conduct was negligent.

Prior to discovery, the PSERB moved to dismiss the action on the ground the court lacked subject matter jurisdiction because of the eleventh amendment. The district court, although it asserted that it weighed the factors we enunciated in *Urbano v. Board of Managers of New Jersey State Prison,* 415 F.2d 247 (3d Cir. 1969), *cert. denied,* 397 U.S. 948 (1970), appeared to have relied heavily on the similarity it found between the PSERB and the State Employees' Retirement Board considered in *United Brokers Mtg. Co. v. Fidelity Philadelphia Trust Co.,* 26 Pa. Commw. Ct. 260, 363 A.2d 817 (1976). It concluded that "[t]he statutory scheme establishing SERB [State Employees' Retirement Board] and the fund it administers is virtually identical in all material respects to the statutory scheme adopted for the PSERB and the fund here in question." 462 F. Supp. 825, 827 (E.D. Pa. 1978). The district court granted the motion to dismiss. The plaintiff appeals.

The defendant, in support of its motion to dismiss, relied exclusively on the various provisions of the Public

School Employees' Retirement Code ("the Code"). Plaintiff contends that an analysis of the Code reveals that the PSERB is not the *alter ego* of the State for eleventh amendment purposes. Alternatively, he argues that even assuming *arguendo* that the Code does not affirmatively establish the PSERB's independence, it does not establish the contrary—that it is the State's *alter ego*. The Board responds that the Code establishes it as the State's *alter ego* and also contends that the district court lacks jurisdiction under the diversity statute and principles of state sovereign immunity. Furthermore, it claims the action should be dismissed against the individual defendants because of official immunity. In the alternative, the Board argues, the abstention doctrine should be applied to prevent the district court from entertaining the claim. Because we conclude the district court should have developed a record beyond the skeletal language of the Code, we vacate the judgment and remand for further proceedings not inconsistent with this opinion.

## II.

The eleventh amendment has been interpreted to bar jurisdictionally the federal courts from entertaining suits for damages when a state is the real party in interest.[1] *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945). It is not necessary that the state be named as a party, only that the named party is, in actuality, the *alter ego* of the state.

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[1] The eleventh amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

In *Urbano v. Board of Managers of New Jersey State Prison, supra,* 415 F.2d at 250-51, this court adopted the following criteria to determine whether an agency, commission or board which is related to the state should be regarded as the sovereign's *alter ego* for eleventh amendment purposes.

> [L]ocal law and decisions defining the status and nature of the agency involved in its relation to the sovereign are factors to be considered, but only one of a number that are of significance.
>
> Among the other factors, no one of which is conclusive, perhaps the most important is whether, in the event plaintiff prevails, the payment of the judgment will have to be made out of the state treasury; significant here also is whether the agency has the funds or the power to satisfy the judgment. Other relevant factors are whether the agency is performing a governmental or proprietary function; whether it has been separately incorporated; the degree of autonomy over its operations; whether it has the power to sue and be sued and to enter into contracts; whether its property is immune from state taxation, and whether the sovereign has immunized itself from responsibility for the agency's operations.

We again look to these nine factors for guidance in deciding whether the eleventh amendment precludes this suit from federal court.

A. *How does local law define the status and nature of the PSERB and its relation to Pennsylvania?* (*Urbano* factor 1)

The question of whether an agency is the *alter ego* of a state and thereby immune from federal jurisdiction under the eleventh amendment is a question of federal, not

state, law. *Harris v. Pennsylvania Turnpike Commission,* 410 F.2d 1332, 1334 n. 1 (3d Cir. 1969), *cert. denied,* 394 U.S. 1005 (1970). However, state decisions concerning the relationship of an agency to the state may be an important, and under certain circumstances a controlling factor in the determination of immunity. *Skehan v. Board of Bloomsburg State College,* 538 F.2d 53, 62 (3d Cir.) (en banc), *cert. denied,* 429 U.S. 979 (1976).

In *United Brokers Mortgage Co. v. Fidelity Philadelphia Trust Co.,* 26 Pa. Commw. Ct. 260, 363 A.2d 817 (1976), the Commonwealth Court, sitting as a court of original jurisdiction, considered whether the PSERB and the State Employees' Retirement Board were so integrated with the state as to be immune from suit under principles of state sovereign immunity. The court analyzed the design of the State Employees' Retirement Board and concluded it was sufficiently integrated with the state so as to be shielded from liability under the doctrine of state sovereign immunity. It then turned to the PSERB and without analysis summarily concluded it was "analogous in relevant parts" to the State Employees' Retirement Board" so as to make further discussion superfluous." Pa. Commw. Ct. at , 363 A.2d at 820.[2]

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[2] The court also, in a single footnote summarized *some* of the characteristics of the PSERB.

> 24 Pa. C.S. §8501(a) provides for an independent administrative board of eleven members including the Secretary of Education, State Treasurer, appointees of the Governor, and others, 24 Pa. C.S. §8501(e) gives the board the powers and privileges of a corporation, and appoints the Attorney General, legal advisor. 24 Pa. C.S. §8531 makes the board's debt obligations of the Commonwealth, 24 Pa. C.S. §8521(b) provides for operating appropriations from the General Fund.

——Pa. Commw. Ct. at —— n. 3; 363 A.2d at 820.

As we have already noted, the district court in this case relied heavily on *United Brokers* in concluding the PSERB was an *alter ego* of the State for eleventh amendment purposes. We believe this reliance was misplaced[3]

In deciding the precise issue before us, *United Brokers* carries little weight for several reasons. First, although a federal court in a diversity suit may not ignore a decision of an intermediate state court as to matters of state law, it is not bound by it, if after analysis it believes the state's highest court would hold otherwise. This is especially true when the intermediate court is sitting as a court of original jurisdiction. *National Surety Corp. v. Midland Bank,* 551 F.2d 21, 29-30 (3d Cir. 1977). Second, the reasoning in *United Brokers* on this issue fails to consider in detail the relationship of the PSERB to the Commonwealth. Third, the opinion equates the State Employees' Retirement Board to the PSERB without considering their substantial differences. For eleventh amendment purposes, the most significant differences are that the funding for the State Employees' Retirement Board is derived almost exclusively from the state and a majority of its directors are state appointees. By contrast, it appears that a substantial portion of the PSERB's funding is derived from non-state sources and its board is not controlled by state appointees. These differences are significant.

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[3] The district court also relied on *Flesch v. Eastern Pennsylvania Psychiatric Institute,* 434 F. Supp. 963, 977 (E.D. Pa. 1977), where the court held the State Employees' Retirement Board was "a separate arm of the state entitled to Eleventh amendment protection." Because of the many differences between the PSERB and the State Employees' Retirement Board, we believe reliance on *Flesch* was also misplaced.

B. *Whether payment of the judgment will be made from the state treasury or from PSERB funds?* (*Urbano* factors 2 and 3)

The most important factor in the determination of eleventh amendment immunity is whether judgment will have to be paid from the state treasury. *Urbano, supra,* 415 F.2d at 251. In *Ford Motor Co. v. Department of Treasury, supra,* 323 U.S. at 464 (1945), the Court stated "when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit. . . ."

Under the Code, the PSERB fund comprises contributions by the Commonwealth,[4] the employer,[5] the employee,[6] and investment income. The fund is set apart in the state treasury from general state funds and is to be administered by the State Treasurer[7] at the direction of the Board.[8] The Treasurer is required to maintain a separate annuity reserve account for employee benefit funds and is not to commingle those funds with general PSERB funds.[9] The payment of benefits is specifically made an obligation of the State.[10] We do not believe the statutory language of the Code provides a sufficient basis for us to determine whether payment of the judgment in this case will be paid from the state treasury or from PSERB funds. Although we recognize that the exact percentage of the state contribution is not determinative of eleventh amendment im-

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[4] 24 Pa. C.S. §8326.
[5] 24 Pa. C.S. §8327.
[6] 24 Pa. C.S. §§8321-8324.
[7] 24 Pa. C.S. §8221(c).
[8] 24 Pa. C.S. §8522.
[9] 24 Pa. C.S. §§8524, 8525.
[10] 24 Pa. C.S. §8531.

munity, the nature and size of those funds may be probative.

The PSERB asks us to take judicial notice of the State's $206,008,000 appropriation to the fund during the past year, as well as lesser contributions during the previous five years, as evidence that a judgment against it will be paid out of funds in the state treasury. The amount of appropriation, without evidence of the obligation it is intended to meet, is not dispositive. The State may contribute to the fund in several ways; as an employer of teachers at state colleges, by direct contributions to public school districts which in turn support the fund, by contributions which the state is statutorily obligated to make[11] and under the statutory provision by which it guarantees all obligations of the Board. For eleventh amendment purposes, the nature of the state's obligation to contribute may be more important than the size of the contribution.

In *Mt. Healthy City School Board of Education v. Doyle,* 429 U.S. 274 (1977), the Court considered the eleventh amendment immunity of a public school district which received "a significant amount of money from the State." *Id.* at 280. The Court concluded that the school district was not an arm of the State and thus subject to suit under the eleventh amendment. Thus, the existence of even significant state financial support will not necessarily encase an entity with eleventh amendment immunity. Rather, a court should consider whether the state, in making the contribution, is acting in the role of the sovereign or is contributing in some other capacity.

Inquiry must also be made as to whether the PSERB has sufficient funds in its segregated account to meet

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[11] 24 Pa. C.S. §8326.

Blake's claim or whether resort to general funds of the state treasury will be required.[12] In answering these questions the district court should have given appropriate weight to the opinion of the Pennsylvania Attorney General[13] describing the PSERB, wherein he stated:

> While the Commonwealth meets its obligations by paying one-half of the employers' share for retirement benefits, nevertheless, once that obligation is satisfied and the money deposited in the Retirement Fund for investment and other statutory purposes, that money loses its identity as Commonwealth funds and becomes trusteed funds earmarked for a particular purpose.

Office of the Attorney General, Official Opinion No. 77-1, Penn. Bulletin, Vol. 7, No. 8 503, 504 (1977).

The district court also should have considered whether the State Treasurer performs a ministerial function or whether he has some discretion in administering the fund. Furthermore, on remand it should ascertain whether the PSERB funds are subject to attachment in the event the State defaults in the payment of its general obligations.

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[12] In determining whether the judgment will be paid by PSERB or general funds of the state treasury, the court should examine whether title to the funds is in the State or in the Board. In *Aerojet-General Corp. v. Askew*, 453 F.2d 819 (5th Cir. 1971), *cert. denied*, 409 U.S. 892 (1972), the court concluded that the Florida State Board of Education and the State Board of Trustees of the Internal Improvement Trust Fund were not immune from suit under the eleventh amendment principally because both boards held title to their property in their own names.

[13] *In re Jackson*, 268 F. Supp. 434, 443 (E.D. Mo.), *aff'd sub nom.*, 385 F.2d 775 (8th Cir. 1967), indicates an attorney general's opinion "is entitled to great respect and *should ordinarily be followed where judicial decisions construing the statute are lacking.*"

The court should also consider any other factors relevant to the character of the PSERB's funds. The issue of whether payment is from the state treasury or from PSERB funds, although important, is not dispositive. It is only meaningful in light of the agency's other attributes.

C. *Whether the PSERB is performing a governmental or proprietary function?* (*Urbano* factor 4)

The PSERB appears to function as a private life insurance company, collecting and investing money, and paying pensions and death benefits, rather than as a government entity. In describing PSERB's function, the Pennsylvania Attorney General noted:

> it must be recognized that the PSERB administers a pension program which is not within the ordinary sphere of governmental activity. It acts in a primarily proprietary capacity for and on behalf of public school employees.

Official Opinion No. 77-1, *supra* at 503-04. The Board is operated like a trust with its members acting as trustees for and on behalf of public school employees. Although the Code indicates the PSERB performs a proprietary function, other relevant factors ought to be assessed which indicate whether or not the PSERB performs government functions. For instance, the district court should determine whether the plan covers primarily state or non-state employees.[14]

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[14] We are aware that employees of the state, such as employees of the Department of Education and state colleges, as well as non-state employees, such as local school teachers, Board of Education members, and perhaps others, contribute to the plan. It would be helpful to ascertain the numbers and percentages of contributions by each group. It would also be helpful to ascertain whether participation is voluntary or mandatory.

D. *Whether the PSERB has corporate powers and is autonomous?* (*Urbano* factors 5, 6, 7)

These *Urbano* factors go to the ability of the PSERB to sue and be sued as well as exercise control over its own affairs. Although the PSERB has not been separately incorporated, the Code indicates that it "shall possess the power and privileges of a corporation."[15] Whether or not the Board does in fact operate like a separate corporations needs further examination on remand.

The degree of autonomy of the PSERB is crucial in the determination of eleventh amendment immunity. The primary purpose of the eleventh amendment is to assure that the federal courts do not interfere with a state's public policy and its administration of internal public affairs. *In re Ayres,* 123 U.S. 443, 505 (1887). Thus, the degree of autonomy of the PSERB will be extremely important in determining whether it is the *alter ego* of the State under the eleventh amendment.

The PSERB is an eleven-member Board including four state representatives. Pennsylvania's representatives are the State Treasurer, the Secretary of Education and two gubernatorial appointees. The other seven Board members are independent of the Commonwealth. Thus, the majority of the Board are not state representatives. The eleven members of the Board act as trustees of the fund and maintain independent investment control. The Attorney General's opinion on the PSERB declared that "the function of managing the Public School Employees' Retirement Fund is uncontrovertably one which the Board exercises independent of any control by the Governor's Office." Official Opinion No. 77-1, *supra,* at 503. Facial-

[15] 24 Pa. C.S. §8501(e).

ly, it does appear that the Board has a great deal of autonomy. On remand the district court should consider and carefully weigh any evidence which countervails and supports the PSERB's apparent autonomy.

E. *Whether the agency's property is immune from state taxation?* (*Urbano* factor 8).

Section 8533 of the Code provides:

> The right of a person to a member's annuity, a state annuity, or retirement allowance, to the return of contributions, any benefit or right accrued or accruing to any person under the provisions of this part, and the moneys in the fund are hereby exempt from any state or municipal tax.

Blake contends that this exemption of benefits from state taxes is not relevant for eleventh amendment immunity purposes because private pension plans are also exempt from taxation under 72 P.S. §7301 (iii).

It is not clear from the current state of the record whether the PSERB is exempt from other Pennsylvania taxes. On remand, the district court should ascertain whether the PSERB's property enjoys immunity from taxation in a manner not offered to analogous private insurers.

F. *Whether the sovereign has immunized itself from responsibility of the PSERB's operations?* (*Urbano* factor 9)

Section 8531 of the Code provides that "statutory interest charges payable, the maintenance of reserves in the fund, and the payment of all annuities and other benefits granted by the board" are "obligations of the Commonwealth." Thus, it is evident that Pennsylvania has ultimate responsibility for obligations of the PSERB.

However, we do not believe the inquiry is complete once it is determined that the State is the guarantor of the Board's debts. In *Zeidner v. Wulforst,* 197 F. Supp. 23 (E.D. N.Y. 1961), the court considered the eleventh amendment immunity of the New York State Thruway Authority. It concluded that there was no eleventh amendment immunity because the only liability of the State was in guaranteeing the Authority's notes and bonds. In a sense, this factor reaches the same concerns as the second and third *Urbano* factors, whether payment will be made from the state treasury or from the PSERB's funds. As the Court stated in *Edelman, supra,* 415 U.S. at 668, an ancillary effect on the state treasury will not create an eleventh amendment jurisdictional bar. Therefore, we deem it necessary that the record disclose whether the State has ever had to spend its funds under this general guarantee and whether the PSERB can meet the judgment in this case from its own funds.

The above analysis under *Urbano* indicates that the district court should have permitted discovery and held a hearing before ruling on the issue of eleventh amendment immunity. Although we recognize in certain instances summary disposition of the eleventh amendment issue is possible, in a close case such as this, evidence beyond the mere statutory language is required. We therefore vacate the district court's holding of eleventh amendment immunity and remand for further proceedings not inconsistent with this opinion.

III.

The PSERB also questions the ability of the district court to hear this case under the statutory grant of diversity jurisdiction. It relies on *Illinois v. City of Milwaukee,*

406 U.S. 91, 97 n. 1 (1972), where the Court held a suit against a state is not a suit between citizens of different states for purposes of diversity jurisdiction. The PSERB argues that since it is a state agency it cannot be sued on the basis of diversity jurisdiction in federal court.

The federal courts cannot entertain a suit in diversity jurisdiction against a state or its *alter ego, Moor v. County of Almeda,* 411 U.S. 693, 720 (1973); *Krisel v. Duran,* 386 F.2d 179, 181 (2d Cir. 1967). Thus, the question of diversity jurisdiction in this case parallels the eleventh amendment question; whether the PSERB is the *alter ego* of the state.[16] The district court's determination of the Board's *alter ego* status under the eleventh amendment will also determine the availability of diversity jurisdiction.

IV.

The PSERB contends that it is immune from suit because of state sovereign immunity under Pennsylvania law.

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[16] Chief Judge Seitz discussed the relationship between eleventh amendment immunity and diversity jurisdiction in his concurring opinion in *Ramada Inns, Inc. v. Rosemount Memorial Park Ass'n,* 598 F.2d 1303, 1309 (3d Cir. 1979).

> It is surprising, however, given the divergent principles underlying the two inquiries, that the only distinction between them to have received judicial recognition to date is that the state may waive its eleventh amendment sovereign immunity but is unable to waive the lack of subject matter jurisdiction if diversity does not exist in a given suit. *See State Highway Commission of Wyoming v. Utah Construction Co.,* 278 U.S. 194, 199-200 (1929); *Harris v. Pennsylvania Turnpike Commission,* 410 F.2d 1332, 1333 n. 1 (3d Cir. 1969).

Since eleventh amendment waiver is not at issue in this case, the eleventh amendment and diversity issues involve the same inquiry.

*Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938), makes it clear that the district court is obliged to apply the law of the state as pronounced by the state's Supreme Court. As we have already indicated *supra,* where the State Supreme Court has not ruled on the precise issue, the federal court should ordinarily follow related state precedents.

The Pennsylvania Supreme Court has not determined whether the PSERB is entitled to state sovereign immunity.[17] In reversing its prior decisions holding that the Pennsylvania Turnpike Commission shares the immunity of the Commonwealth, *Specter v. Commonwealth,* 462 Pa. 474, 341 A.2d 481 (1975), held that the question of state sovereign immunity is no longer resolved simply by the governmental nature of an entity but upon whether it is or is not part of the Commonwealth, as that term is used in the Pennsylvania Constitution's establishment of immunity. *Id.* at 483. In relevant aspects this inquiry is analogous

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[17] In *United Brokers, supra,* the commonwealth court, sitting as a court of original jurisdiction, held that the PSERB was entitled to state sovereign immunity. In *Skehan v. Board of Trustees of Bloomsburg State College, supra,* 538 F.2d at 62, this court chose to follow the commonwealth court's decision in *Brungard v. Hartman,* 12 Pa. Commw. Ct. 477, 315 A.2d 913 (1974), holding that a state college was entitled to state sovereign immunity. In *Brungard,* it was clear that the state-owned and state-operated state college was the *alter ego* of the state for sovereign immunity purposes. It is less clear whether the PSERB is the *alter ego* of the state. We do not read *Skehan* as altering *Erie* so as to require this court to follow the commonwealth court's pronouncement of state law. After *Skehan* this court reaffirmed its view that the federal courts are not bound by a state intermediate court in *National Surety Corp. v. Midland Bank,* 551 F.2d 21, 29-30 (3d Cir. 1977). We decline to view *United Brokers* as controlling for the reasons stated at 5-7, *supra.*

to the eleventh amendment *alter ego* test.[18] *Harris v. Pennsylvania Turnpike Commission, supra,* 410 F.2d at 1333-34 n. 1. Therefore, the court's determination of the eleventh amendment issue will resolve the question of state sovereign immunity.

The PSERB also asks this court to dismiss the case against the individual defendants under the doctrine of official immunity. We find it unnecessary to explore the bounds of official immunity in this case because the pleadings and briefs make it clear that the individual defendants are only nominal parties and damages are sought exclusively from the PSERB's funds. Any immunity enjoyed by the PSERB will thus bar the plaintiff's right to recovery and make the determination of the official immunity of the individual defendants irrelevant.[19] *See Ford Motor Co. v. Department of Treasury, supra,* 323 U.S. at 464.

## V.

As a final matter, the PSERB asks this court to dismiss Blake's claim under the abstention doctrine. Although it was not raised in the district court, abstention may be raised by this court *sua sponte. Bellotti v. Baird,*

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[18] It is also possible that the State waived its sovereign immunity in this case by admitting that Blake may present her claim in an administrative forum. However, it is unnecessary for the district court to reach the question of waiver because its decision on the *alter ego* status of the PSERB under the eleventh amendment will control its ability to hear the case under principles of state sovereign immunity.

[19] We would be faced with an entirely different issue if Blake had attempted to sue the individual defendants to reach their personal funds.

428 U.S. 132, 143-44 n. 10 (1976). However, "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 813 (1975). The PSERB relies on *Urbano,* where this court found no eleventh amendment immunity but applied the abstention doctrine to avoid needless conflict with New Jersey's administration of its own affairs and to permit the New Jersey courts to resolve an unsettled question of state law.

Renunciation of the duty of a federal district court to decide a controversy properly before it under the abstention doctrine is justifiable only in exceptional circumstances. Abstention is proper where a state determination of pertinent state laws may moot a federal constitutional issue, where there are difficult questions of state law bearing on policy issues of substantial public import which transcend the case at bar, and where, absent bad faith, harassment or a patently invalid state statute, the doctrine is invoked to restrain state criminal proceedings. *Colorado River Water Conservation District v. United States,* 424 U.S. at 814-816. The PSERB claims that abstention is proper in this case because federal jurisdiction will interfere with an established procedure to handle disputes over benefit payments and the state law on the issue is unsettled.

We do not believe this case calls for abstention by the federal courts. It appears that Pennsylvania has no established procedure to handle claims against the PSERB. Although at oral argument the PSERB indicated an administrative remedy was available, it appears such a remedy is only optional and has never been pursued. Thus, federal jurisdiction will not interfere with an established state procedure. Furthermore, this case does not

involve unsettled questions of state law bearing on substantial policy issues of public import but classic questions of contracts, negligence and fiduciary duties.

In *Urbano* the court applied the abstention doctrine in a suit involving a trust fund for prisoners. The court said "[i]t is clear that New Jersey would have an overriding interest in the development of its own policy regarding the establishment of trust funds for inmates of prisons and other state institutions." 415 F.2d at 257. We do not believe that Pennsylvania has the same sort of interest in this case. *See Baltimore Bank for Cooperatives v. Farmers Cheese Cooperative,* 583 F.2d 104, 111 (3d Cir. 1978.

VI.

We conclude that it is not clear from this record whether the PSERB is the *alter ego* of Pennsylvania for purposes of the eleventh amendment, diversity jurisdiction and state sovereign immunity. In a close case such as this, involving significant issues of federal jurisdiction and contractual rights of the parties, it is important for the district court to go beyond the statutory language and examine the operational structure of the agency and its relationship to the Commonwealth. The judgment of the district court will therefore be vacated and the case remanded for further proceedings not inconsistent with this opinion. Costs taxed against appellees.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

IN THE

# SUPREME CC 'RT OF THE UNIT ED STATES

Supreme Court, U. S.
FILED
MAY 23 1980
MICHAEL RODAK, JR., CLERK

October Term, 1979

No. 79-1463

CARYL M. KLINE, ROBERT E. CASEY,
FRED M. HEDDINGER, WILLIAM F. JACOBS, JR.,
JOHN D. KILLIAN, JACQUE D. ANGLE, FRANCIS MORAN,
J. HENRY EISENHART, BENJAMIN L. STACKOWISKI,
SAMUEL CORRADO, RICHARD C. HARRIS,
and the
PUBLIC SCHOOL EMPLOYES' RETIREMENT BOARD,
*Petitioners*

*v.*

MARGARET ANNE BLAKE, A Minor, by
JAMES BLAKE, Her Guardian,
*Respondent*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ON PETITION FOR WRIT
OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

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## QUESTION PRESENTED

Should the Supreme Court allocate its resources to review an interlocutory decision of a Court of Appeals which remands the case to the district court for the purpose of augmenting a deficient record when the decision was correctly based on established Eleventh Amendment standards?

## RESTATEMENT OF THE CASE

Respondent is satisfied with the petitioners' Statement of the Case, except insofar as that Statement recites "facts" outside the record. There having been no discovery in the case and no hearings of any kind, the only "facts" of record are the various provisions of the Public School Employees' Retirement Code.

## ARGUMENT

**In Keeping with the Supreme Court's Tradition of Requiring a Full and Complete Factual Basis Before Deciding a Constitutional Issue, the Court Should Deny Petitioners' Request to Review This Interlocutory Decision of the Third Circuit.**

Petitioners want this Court to review a constitutional issue on a record which the Court of Appeals described as "deficient." *Blake v. Kline*, 612 F.2d 718, 720 (3rd Cir. 1979). This Court should refuse to do so.

The decision below was "clearly interlocutory." Brief for Petitioners at 11 n. 14. This Court has always been extremely reluctant to review interlocutory decisions and will usually not review a Court of Appeals' interlocutory order "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, T&K R. Co.*, 148 U.S. 372, 384 (1893).[1]

Petitioners have shown no inconvenience or embarrassment to justify the interlocutory review they seek. Moreover, the Third Circuit's decision was not only interlocutory; it did not even dispose of the issue upon which petitioners base their petition. This Court has consistently refused to review interlocutory decisions, preferring instead to review cases after a full and complete record has been established. In light of this tradition, it would be anomalous for the Court to grant review of an interlocutory decision which was based solely on the ground that the record was deficient as to the very issue the Court has been asked to review.

The Court has been especially vigilant in requiring a full and complete record as a predicate for the adjudication of novel and serious constitutional issues. *Estelle*

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1. *See also Firemen v. Bangor & A.R. Co.*, 389 U.S. 327, 328 (1967); *Cobbledick v. United States*, 309 U.S. 323, 324-25 (1940); *Hamilton Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

*v. Gamble*, 429 U.S. 97, 114 (1976) (Stevens, J., dissenting). The "Court has often refused to decide constitutional questions on an inadequate record." *Ellis v. Dixon*, 349 U.S. 458, 464 (1955). Even after oral argument, the Court has found it necessary to dismiss a writ of certiorari as being improvidently granted when it became apparent "that the record [was] not sufficiently clear and specific to permit decision of the important constitutional questions involved in the case." *Massachusetts v. Painten*, 389 U.S. 560, 561 (1968).

Eleventh Amendment issues, in particular, require a full and complete record. As the Court commented in *Ex parte New York*, 256 U.S. 400, 500 (1921), "It is now established that the [applicability of the Eleventh Amendment] is to be determined . . . by the essential nature and effect of the proceeding as it appears from the entire record." Because the most important factor in deciding an Eleventh Amendment issue is whether a judgment would necessarily have to be paid directly out of the general state treasury, *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945), the record in an Eleventh Amendment case must contain all relevant facts as to the effect on the state treasury of a judgment for plaintiff. The record in this case, however, contains no evidence whatsoever, other than the provisions of the Public School Employees' Retirement Code, on the question of how a judgment for plaintiff would affect the state treasury. Indeed, the case was remanded solely for the purpose of creating a more complete record. 612 F.2d at 720.

Without an adequate record on the basic question whether a judgment for plaintiff would "to a virtual certainty be paid from state funds," *Edelman v. Jordan*, 415 U.S. 651, 668 (1974), the Court can not adequately review the Eleventh Amendment issue.

**Because the Court of Appeals Correctly Applied a Well Defined Body of Case Law, the Supreme Court Should Deny Petitioners' Request for Writ of Certiorari**

The Court has held that when an action is in essence one for the recovery of money from the state, the Eleventh Amendment applies, *see, e.g., Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945); but when an action would have only an ancillary effect on the state treasury, the Eleventh Amendment does not operate. *Edelman, supra*. The Court of Appeals has correctly applied this rule. It held that "The most important factor in the determination of eleventh amendment immunity is whether judgment will have to be paid from the treasury." 612 F.2d at 723. After reviewing the skeletal record, the Court of Appeals ruled that the Eleventh Amendment issue could not be decided until the record made clear the extent to which, if at all, a judgment for plaintiff would in fact have to be paid out of the general state treasury.

Because the Third Circuit correctly applied a well developed body of case law, there is no need for this Court to allocate its limited resources to a review of the Court of Appeals' decision.

**The Decision of the Court of Appeals Is Not Inconsistent with the Decision of the Court of Appeals for the Second Circuit in *Fitzpatrick v. Bitzer***

The decision of the Third Circuit to remand the case for the purpose of discovery is not inconsistent with the decision of the Court of Appeals for the Second Circuit in *Fitzpatrick v. Bitzer*, 519 F.2d 559 (2nd Cir. 1975), *rev'd in part*, 427 U.S. 445 (1976). *Fitzpatrick* was decided only after a hearing on the merits. The *Fitzpatrick* court, therefore, had a full and complete record upon which to base its decision. Consistent with the

*Fitzpatrick* decision, the Third Circuit ruled that the *Blake* record must be augmented before a decision on the Eleventh Amendment issue could be made. Because *Blake*, unlike *Fitzpatrick*, reached the appellate court before an adequate record had been established, the Third Circuit could not finally resolve the Eleventh Amendment issue as did the court in *Fitzpatrick*. Thus, the Third Circuit's decision does not conflict with the Second Circuit's decision in *Fitzpatrick*.[2]

Just as the Third Circuit declined to decide the Eleventh Amendment issue because of the deficient record, so too should this Court postpone its review of the case until a full and complete record has been established.[3]

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2. The two district court cases which petitioners suggest are in conflict with the Third Circuit's decision, *Flesch v. Eastern Pennsylvania Psychiatric Inst.*, 434 F. Supp. 963 (E.D. Pa. 1977) and *21 Properties, Inc. v. Romney*, 360 F. Supp. 1322 (N.D. Tex. 1973), are factually distinguishable from *Blake*. *Blake* involves a retirement system whose board is not subject to state control and whose fund is made up primarily of contributions by non-state employees and non-state employers. The retirement boards in *Flesch* and *21 Properties* were controlled by the state and their retirement funds were made up primarily of contributions by the state and state employees. 434 F. Supp. at 977-78 and 360 F. Supp. at 1325-26.

3. Petitioners finally contend that a writ of certiorari should be granted because the decision of the Third Circuit is in direct conflict with a Pennsylvania appellate court decision, *United Brokers Mortgage Co. v. Fidelity Philadelphia Trust Co.*, 26 Pa. Cmwlth., 260, 363 A.2d 817 (1976). *United Brokers*, a decision of the Commonwealth Court sitting as a court of original jurisdiction, did not involve an Eleventh Amendment issue and was properly considered by the Third Circuit. *See* 612 F. 2d at 726-27 n. 17.

## CONCLUSION

For the foregoing reasons, the petition should be denied.

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